SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
OCT 6 1962
JOHN F. DAVIS, CLERK

No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1962

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon corporation,
Petitioner,

vs.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1200 Jackson Tower,
Portland, Oregon,
CAMERON SHERWOOD,
SHERWOOD, TUGMAN & GREEN,
Baker Building,
Walla Walla, Washington,
Attorneys for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-62

INDEX

	Page
Citation to opinions below	1
Jurisdiction	2
Questions presented	2
Constitution and Statutes Involved	3
Statement of the Case	3
Reasons for granting a writ	10
Specific conclusions reached by the Court of Appeals indicated that it overran the jury on the facts and the trial judge upon questions of local law	18
Conclusion	25
Appendix A—Opinion of the Court of Appeals	A 1
Appendix B—Opinion of the District Court on motion for judgment notwithstanding the verdict and in the alternative for a new trial	A11

TABLE OF AUTHORITIES

Page

CASES

Allen v. Matson Navigation Co. (9 Cir., 1958), 255 F2d 273 12

Atlantic and Gulf Stevedores v. Ellerman Lines (April 2, 1962), 369 US 355 ..... 11, 24

Beacon Theatres v. Westover (1959), 359 US 500 10

Breece v. J. F. Chapman & Sons, Inc. (3 Cir., 1962), 302 F2d 581 15

Coca-Cola Bottling Co. of Black Hills v. Hubbard (8 Cir., 1951), 186 F2d 148 16

Commissioner v. Culbertson (1948), 337 US 733, 743 20

Cone v. West Virginia Pulp & Paper Co. (1947), 330 US 212 ..... 11, 13, 15

Continental Ore Co. v. Union Carbide (9 Cir., 1960), 289 F2d 86 7

Continental Ore Co. v. Union Carbide (June 25, 1962), 370 US 690 ..... 11, 19

De Britz v. Sylvia (1944), 25 Wn2d 428, 171 P2d 159 23

Dick v. New York Life Insurance Co. (1959), 359 US 437 ..... 11, 24

Erie R. Co. v. Tompkins (1938), 304 US 64 14

Freimuth v. Glens Falls Insurance Co. (1957), 50 Wn2d 621, 314 P2d 468 23

Gibson v. Phillips Petroleum Corp. (1956), 352 US 874 11

Hill v. Waxberg (9 Cir., 1956), 237 F2d 936 ..... 11, 17

Illinois Terminal R. Co. v. Creek (8 Cir., 1953), 207 F2d 475, 479 ..... 11, 13, 16, 24

Jaffke v. Dunham (1957), 352 US 280 7

TABLE OF AUTHORITIES (Cont.)

Page

Johnson v. Union Pacific R. Co. (1957), 352 US 957 12

Kaufman v. Kaufman (June 8, 1962), 160 Wn. Dec. (Adv) No. 1, p. 1 20

Michalic v. Cleveland Toulset, Inc. (1960), 364 US 325 25

Milone & Tucci, Inc. v. Bona Fide Builders, Inc. (1956), 49 Wn2d 363, 301 P2d 759 17, 22

New York Life Ins. Co. v. Harrington (9 Cir., 1956), 299 F2d 803, 808 12

Offutt v. United States (1954), 348 US 11 at 14 15

Patton v. Texas & P.R. Co. (1900), 179 US 698 11, 13

Pierce Consulting Engineer Co. v. City of Burlington, Vt. (2 Cir., 1955), 221 F2d 607 11, 16

Rogers v. Missouri P. R. Co. (1957), 352 US 500 19

Schultz v. Pennsylvania Railroad Co. (1956), 350 US 523 25

Senko v. La Crosse Dredging Corp. (1957), 352 US 370 25

Sentilles v. Inter-Caribbean Shipping Corp. (1959), 361 US 107 25

Smith v. Buck (9 Cir., 1957), 245 F2d 348 12

Smith v. Onyx Oil and Chemical Co. (2 Cir., 1955), 218 F2d 104 20

Standard Oil Co. v. Lyons (8 Cir., 1942), 13 F2d 935 20

Swafford v. Atlantic Coast Line R.R. Co. (1955), 350 US 807 11

Trivette v. New York Life Ins. Co. (6 Cir., 1960), 283 F2d 441 12

Union Trust Co. v. Eastern Air Lines, Inc. (1955), 350 US 907 11

TABLE OF AUTHORITIES (Cont.)

Page

Waialua Agricultural Co. v. Christian et al. (1938), 305 US 91, 109 ..... 11, 13

Western Asphalt Co. v. Valle (1946), 25 Wn2d 428, 171 P2d 159 ..... 11, 16, 17

Williams v. Carolina Life Insurance Co. (1954), 348 US 802 11

Wong v. Swier (9 Cir., 1959), 267 F2d 749 12

CONSTITUTION AND STATUTES

United States Constitution, 7th Amend. 2, 3

Judiciary Act of 1911, Sec. 120, Chap. 231, 61st Cong., 36 Stat. 1132 14

28 USC § 47 14

28 USC § 292 (a), Act of June 25, 1948, C. 646, 62 Stat. 901 ..... 2, 3, 13, 14

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Gunderson Bros. Engineering Corporation, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit as entered in the above-entitled cause on June 19, 1962.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 305 F.2d 659 and is printed in Appendix A hereof, page A1. The opinion of the District Court upon denial of Respondent's motion for judgment

n.o.v. and, in the alternative, for a new trial, is unreported and is printed in Appendix B hereof, page A11.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered June 19, 1962 (R. 734) and petition for rehearing filed July 17, 1962 was denied August 13, 1962 (R. 735). The jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

Whether, in a diversity action for breach of contract, the Court of Appeals in reversing a judgment solely because it viewed the evidence as being insufficient to support the verdict of the jury after the trial judge had expressly found otherwise, was re-examining facts as forbidden by the Seventh Amendment and otherwise exceeding its limited appellate jurisdiction so as to have deprived Petitioner of its right to trial by jury.

Whether Petitioner in this diversity case received the appellate review which the good public reputation of the Court of Appeals required and which Congress intended in the enactment of 28 USC § 292(a) by reason of the three-judge panel of the Court of Appeals including a District Judge of Seattle, Washington where the sole issue decided against the District Judge of Spokane, Washington who tried the case was the sufficiency of evidence to support the verdict of the jury which in turn involved the local law of Washington and over which the trial judge's permissible views of such law were required to have been followed by the Court of Appeals.

CONSTITUTION AND STATUTES INVOLVED

1. The Seventh Amendment reading:

> "In Suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Act of June 25, 1948, c. 646, 62 Stat. 901, 28 USC § 292(a) reading:

> "(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit."

STATEMENT OF THE CASE

Petitioner Gunderson Bros. Engineering Corp., of Portland, Oregon, sued Respondent, Merritt-Chapman and Scott Corporation, of New York City, in the District Court for breach of contract. District Court jurisdiction was based upon diversity of citizenship. The factual issue was whether or not Respondent, through words and conduct of its officers and agents, had accepted Petitioner's written offer. The jury found that Respondent had accepted such offer, only to thereafter breach its contract to Petitioner's damage in the amount of $98,387.10. Thereafter, the trial judge in a written opinion, denying both of Respondent's motions for judgment notwithstanding the verdict and in the al-

ternative for a new trial, expressly found that the verdict was supported by substantial evidence and that substantial justice did not require action on his part to set aside the verdict (R. 29). The Court of Appeals, comprising HAMLIN and MERRILL, Circuit Judges, and BEEKS, District Judge, however, found contrary to the trial judge and reversed upon this sole issue. The case was not remanded for a new trial.

At the trial, it was admitted as true that prior to March 10, 1956, Respondent, a large general contractor of New York City, was preparing to bid for the prime contract to construct the Priest Rapids Project; a dam and hydroelectric facility on the Columbia River near Ephrata, Washington. Also, that Respondent requested Petitioner, a steel fabricator of Portland, Oregon, to submit to it an offer to design, fabricate and furnish certain fabricated steel portions of bid items of the Priest Rapids Project with delivery by water rather than by rail, and that pursuant to such request Petitioner on March 10, 1956, executed and delivered to Respondent such an offer (R. 4).

Petitioner's offer included the furnishing of 22 spillway (tainter) gates for the dam, less hoists, anchorages and embedded material under Bid Item 8.6 and six draft tube gates under Bid Item 8.6 (R. 67, P. Ex. 1-A). On March 12, 1956, Respondent was found to be low bidder for the prime contract (R. 5). On July 9, 1956, Respondent executed the prime contract and a supplemental prime contract (R. 381, P. Ex. 3, and P. Ex. 5). On August 10, 1956, Respondent for extraneous

reasons[1] advised Petitioner it was giving the spillway gates job to another supplier (R. 61, P. Ex. 9-J).

In view of the foregoing undisputed facts, the trial centered upon the factual issue of whether Respondent, through words and conduct of its officers and agents, had accepted Petitioner's offer which it beneficially used and had retained for almost five months. Before describing the evidence of acceptance, it should be pointed out that the trial judge was confronted with specific Washington law in measuring sufficiency of the evidence to make a jury question.

Expressing the law of Washington, the trial judge instructed the jury that if it found that Respondent had led Petitioner to believe that its offer had been accepted, viewing the words and conduct of Respondent's officers and agents as would a reasonable and prudent person under the same circumstances, it might find that Respondent had accepted the offer (R. 685). The trial judge pointed out to the jury that the evidence disclosed that Respondent had named Petitioner as the supplier of the gates and hoists in its own bid for the prime contract. He then instructed the jury that while such fact alone was not sufficient evidence of a completed contract, it might nevertheless be considered by the jury

[1] Shortly after Respondent repudiated the contract, Respondent's purchasing agent explained to Petitioner that Respondent had to give the spillway gate job to another supplier in order to get it to agree to furnish only two cranes after it had bid three cranes on an "all or none basis" (R. 206). Respondent was contractually trapped because it had already given a third supplier an order for the third crane for a $154,000 savings in price before realizing that the other bid had been on an "all or none" basis (R. 529, P. Ex. 12, Tr. 423, P. Ex. 8, Tr. 387, P. Ex. 13, Tr. 425).

along with all of the other evidence in determining whether there was a complete offer and acceptance and a meeting of the minds in order to constitute a bilateral contract (R. 687). The trial judge's instructions to the jury were unchallenged on appeal and became "the law of the case".

It was upon the following-described evidence cast within the framework of the law of the case that the trial judge found that the verdict for Petitioner was supported by substantial evidence, and upon which the Court of Appeals, only by reweighing the evidence, disagreed:

1. Prior to March 12, 1956, Respondent used Petitioner's offer in its bid for the prime contract. Respondent calculated Petitioner's offer on spillway gates was $60,371 lower than the next lowest offer and that in addition by its water-delivery feature Respondent estimated a savings for itself of $133,600 in erection costs (R. 363). Petitioner's draft tube gates offer was also the lowest which Respondent received (R. 364).

2. Respondent in its bid for the prime contract on March 12, named Petitioner as the manufacturer of the spillway and draft tube gates (R. 378, P. Ex. 3-D) and likewise named Petitioner in its prime contract and supplementary prime contract of July 9, 1956 (R. 381, P. Ex. 3, and P. Ex. 5).

3. On March 12 at Ephrata, Washington, following bid opening, Respondent's Project Manager with authority to speak (R. 162) advised a Captain Lew Russell of a barge line that as to the spillway gates, Petitioner's

figures had been used (R. 157) and that Petitioner would supply the spillway gates (R. 163).

4. On March 26, two weeks after being declared low bidder, Respondent initiated a telephone call to Petitioner in which it advised Petitioner: "As you probably know by now, your name was used in our bid for the furnishing of the spillway gates for the Priest Rapids Project" (R. 105). In that conversation, wherein the offer was in no way criticized, Respondent requested Petitioner to submit an offer to furnish hoists for the spillway gates and, when told that Petitioner was not in the hoist business, advised that it go outside of its plant to get such a quotation and agreed that if this was done Petitioner could put a mark-up on such a quotation and, further, that such quotation would be kept separate and apart from the spillway gates. From this conversation, Petitioner understood that so far as the spillway gates were concerned it had the job (R. 169).

5. At the trial Petitioner offered the following testimony of a general contractor in Washington as to custom and usage of the trade. This testimony was erroneously kept from the jury by the trial judge but could have been used by the Court of Appeals to support the judgment under the rule of *Jaffke* v. *Dunham* (1957), 352 U.S. 280 of which the Court of Appeals was familiar, *Continental Ore. Co.* v. *Union Carbide* (9 Cir, 1960), 289 F. 2d 86:

> "Q. Assuming that a long distance telephone conversation from an authorized representative of the general contractor advises an authorized representative of the supplier, 'You have been named

for the gates on the Priest Rapids Dam,' in substance, would there be any trade understanding of that expression?

A. Customarily, yes, that would be the acceptance and approval of using that individual as the material supplier or subcontractor.

Q. So, if you Mr. George, had called somebody, a supplier, and advised them, 'We have named you on the Spokane Coliseum job to furnish the concrete,' you would feel that you had a contract?

A. I would feel that way, yes, sir.

Q. The word 'named' then means that you have accepted them?

A. It implies that I have accepted them as the supplier or subcontractor, yes" (R. 313).

6. In early June, Respondent advised Petitioner in a telephone conversation that it would not be long before the prime contract was signed, "* * * in which event a purchase order would be awarded immediately" to Petitioner (R. 142). Respondent considered its purchase orders to memorialize bargains previously struck.[2]

7. In early July, when learning that the prime contract had been signed Petitioner telephoned Respondent: "* * * we would certainly like to get going on our phase of the work as rapidly as possible. Now, what do I have to do to go from here?" and was told that the

[2] Respondent treated its "purchase orders" to suppliers as merely writings "formalizing" or "memorializing" bargains previously struck as shown when it gave the spillway gate job to another supplier, its Project Manager testified the bargain was struck upon issuance of the letter of intent and not the subsequent "purchase order" (R. 528). Furthermore, the letter of intent which completed the bargain concluded: "As soon as all details can be worked out concerning the drawing requirements, delivery schedules, etc., our formal purchase order will be mailed to you." (R. 425, P. Ex. 13).

purchase orders were going to be issued from Respondents' Ephrata office (R. 175).

8. On July 30, in New York City, Respondent told Petitioner's plant engineer: "It looks like you people have the job. However, the purchase order will come out of the field office and we are disappointed that you didn't bid on the hoists" (R. 166).

9. On July 25, Respondent's Project Manager Jenks told Petitioner that Petitioner could proceed with shop drawings (R. 188) and at the same time Respondent's Purchasing Agent, Parks told Petitioner that it would be furnishing the draft tube gates (R. 183).

10. On August 2, 1956, Respondent wrote to a supplier in Seattle, Wash., in response to an inquiry a letter as follows:

> "In response to your request of July 25, 1956, the following list of suppliers is furnished to you:
>
> (1) * * *
>
> (2) Spillway Tainter gates by Gunderson Bros. of Portland, Oregon.
>
> (3) Spillway bridges has not been determined yet." (R. 387, P. Ex. 8)

11. Even Respondent's Executive Vice President in New York city testified by deposition that at the time Petitioner was named in Respondent's bid as manufacturer of the spillway gates "you would have to assume that it would be the intention of the bidder that the bid would be used" (R. 353) and also in respect to a letter of May 8 from Respondent to the PUD Engineer, wherein it was stated that Petitioner would be

supplying the spillway gates, that he would have to assume such was the intention of Respondent (R. 351).

REASONS FOR GRANTING A WRIT

"Give us the grain, and throw away the straw."[3]

For the sole reason that it felt the evidence did not support the jury's verdict, the Court of Appeals in this diversity action for breach of contract took from Petitioner its $98,387.10 judgment and handed it a $5,566.22 cost bill. It did this by reversing the District Court in spite of the trial judge, who in denying postjudgment motions had expressly found that the verdict was supported by substantial evidence and that substantial justice did not require action on his part to set aside the verdict (p. A11). Sitting on the Court of Appeals was a District Judge who wrote the opinion for the Court of Appeals, which ran roughshod over both the trial judge and trial jury.

Here are special and important reasons for granting a writ:

1. It is so important to maintain the jury as a fact-finding body that any seeming curtailment of the right should be scrutinized with great care. *Beacon Theatres* v. *Westover* (1959) 359 US 500.

2. As will be shown the transgressions of the Court of Appeals over both trial judge and jury denied Petitioner's rights in many vital respects. Not only did it

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[3] Justice Story: Life and Letters, II, 89-90.

exceed its jurisdiction when it re-examined evidence,[4] refused to apply the limited standard of review required by the Seventh Amendment and decisions of this Court;[5] but, in order to do so, it went counter to the law of the case as established by unchallenged instructions to the jury,[6] counter to the law of Washington,[7] counter to the trial judge's view of the evidence[8] and counter to his right to decide local law short of being clearly erroneous.[9]

For less cause than here, this Court has granted certiorari and summarily reversed the Court of Appeals after it had reversed a District Court whose judge had denied a motion for judgment n.o.v. See: *Williams* v. *Carolina Life Insurance Co.*, (1954) 348 US 802, reversing the Fifth Circuit in 210 F2d 477; *Swafford* v. *Atlantic Coast Line R.R. Co.*, (1955) 350 US 807, reversing the Fifth Circuit in 220 F2d 901; *Union Trust Co.* v. *Eastern Air Lines, Inc.* (1955) 350 US 907, reversing the Court of Appeals for the District of Columbia in 221 F2d 62; *Gibson* v. *Phillips Petroleum Corp.*

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[4] Seventh Amendment, *Dick* v. *New York Life Insurance Co.* (1959) 359 U.S. 437.

[5] *Continental Ore. Co.* v. *Union Carbide*, (June 25, 1962) 370 U.S. 690; *Atlantic and Gulf Stevedores* v. *Ellerman Lines* (April 2, 1962) 369 U.S. 355.

[6] *Pierce Consulting Engineer Co.* v. *City of Burlington*, Vt. (2 Cir, 1955) 221 F.2d 607.

[7] *Western Asphalt Co.* v. *Valle* (1946) 25 Wn.2d 428, 171 P.2d 159 (cited with approval in *Hill* v. *Waxberg*, 9 Cir., 1956, 237 F.2d 936).

[8] *Patton* v. *Texas & P.R. Co.* (1900) 179 U.S. 698; *Cone* v. *West Virginia Pulp & Paper Co.* (1947) 330 U.S. 212.

[9] *Illinois Terminal R. Co.* v. *Creek* (8 Cir, 1953) 207 F.2d 475, 479. *Waialua Agricultural Co.* v. *Christian et al.*, (1938) 305 U.S. 91, 109.

(1956), 352 US 874, reversing the Fifth Circuit in 232 F2d 13; and *Johnson* v. *Union Pacific R. Co.* (1957) 352 US 957, reversing the Ninth Circuit in 233 F2d 427. None of these cases were F.E.L.A. or Jones Act cases, and all but one were diversity actions. Upon finding any substantial evidence to support the verdict in this case, this Court has precedent for ordering "Certiorari granted. Judgment reversed."

3. The decision of the Court of Appeals ran erratic just as torpedoes sometimes do and, as in the case of the erratic torpedo, the decision should be destroyed lest it haunt our jurisprudence for years to come. An exhaustive search finds no prior decision of the Court of Appeals for the Ninth Circuit wherein it has ever reversed a judgment because it believed a trial judge erred in denying a motion for judgment n.o.v. It bolted from the traditional standard of appellate review prescribed by this Court, which, until now, the Court of Appeals has scrupulously observed. *Wong* v. *Swier* (9 Cir., 1959) 267 F2d 749; *Allen* v. *Matson Navigation Co.* (9 Cir., 1958) 255 F2d 273; *Smith* v. *Buck* (9 Cir., 1957) 245 F2d 348. In fact, we must credit Chief Judge Chambers in his concurring opinion in *New York Life Ins Co.* v. *Harrington* (9 Cir 1962) 299 F2d 803, 808 and Circuit Judge Pope, also of the Ninth Circuit, for leading us to this Court's above-cited summary reversals of like cases. Circuit Judge Pope vigorously dissented while sitting on the Court of Appeals for the Sixth Circuit in *Trivette* v. *New York Life Ins. Co.* (6 Cir., 1960) 283 F2d 441. Here, the District Court observed the standard required by both this Court and

prior decisions of the Ninth Circuit (p. A11). In this case the Court of Appeals did not.

4. An important and disturbing question reaching to intended application of 28 USC § 292(a) and the public reputation of the Court of Appeals is raised in this case by the fact that a District Judge of Seattle, Washington, sat on the three-judge panel of the Court of Appeals to reverse the District Judge of Spokane, Washington, who had ruled that the verdict was supported by substantial evidence and that substantial justice did not require him to set it aside. Our point is in no way directed to the integrity or ability of either of the able District Judges, but rather to the conflict so created. It has long been established that a Court of Appeals should give weight to a trial judge's views that evidence supports a verdict: *Patton* v. *Texas & P.R. Co.* (1900) 179 US 698; *Cone* v. *West Virginia Pulp & Paper Co.* (1947) 330 US 212; and, of perhaps more importance, that the trial judge's permissible view of local law in a diversity case will be followed; *Waialua Agricultural Co.* v. *Christian,* et al. (1938) 305 US 91, 109; *Illinois Terminal R. Co.* v. *Creek* (8 Cir., 1953) 207 F2d 475, 479.

The Court of Appeals in its opinion did not even accord "lip service" to the views of the trial judge. Whether true or not, it implicitly appears that the Court of Appeals followed the views of the District Judge who wrote the opinion, and not the views of the District Judge who tried the case, in its search for and application of the law of Washington. We contend that when

Congress by enactment of 28 USC § 292 permitted District Judges to sit upon the Court of Appeals, it did not intend the legislation to be so applied that a District Judge of one state would be in a position to "second guess" the District Judge of the same state who tried the case on matters of sufficiency of the evidence and local law.[10] For the same reason that an able trial lawyer will exercise a peremptory challenge to remove a lawyer from a jury for fear he might set himself up in the jury room as an oracle of the law contrary to the trial judge, so should the Chief Judge in organizing a Court of Appeals see that, if a District Judge is selected to sit upon the Court, no possibility can exist for speculation as to where the Court looked for guidance in respect to local law. In the era of *Erie R. Co.* v. *Tompkins* (1938) 304 US 64, litigants before the Court of Appeals should never be left in wonderment as to whether the trial judge's view of local law was accorded its full faith

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[10] Section 292(a) of Title 28 USC, Act of June 25, 1948, c 646, § 1, 62 Stat 901 originally appeared in the Judiciary Act of 1911, within Section 120 of Chap. 231, 61st Congress, 36 Stat. 1132 which in regard to the Circuit Court of Appeals read in part: "In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court. *Provided*, that no judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals." It thus appears that Congress was much concerned with preventing an obvious conflict of interest as to District Judges sitting upon the Court of Appeals (28 USC § 47). Though not a conflict to a specific case, the organization of the Court of Appeals in the case at bar created a more subtle, but nevertheless just as real, a conflict as to who the Court of Appeals was looking to, if anyone, to search, find and apply the law of Washington as required by the *Erie* doctrine.

and credit. As Mr. Justice Frankfurter pointed out in *Offutt* v. *United States* (1954) 348 US 11 at 14, as to an equally subtle matter: "Justice must satisfy the appearance of justice".

5. This Court in *Cone* v. *West Virginia Pulp & Paper Co.* (1947) 330 US 212, held that a Court of Appeals lacked power to grant judgment n.o.v. where such a motion was not initially made in the District Court. This Court reasoned that the trial judge had such a feel of the case which no printed appellate record could ever impart and had such a broad discretion to either permit a voluntary dismissal or grant a new trial, should justice require, that he must initially be given an opportunity to pass on the question. Is not this same reason for denying the Court of Appeals this power in the *Cone* case equally as valid and persuasive for this Court in this case to at least grant certiorari? Where the District Court *denies* motions for judgment n.o.v. and a new trial, the exercise of the power of the Court of Appeals to reverse without remanding for a new trial becomes so drastic and is so rare that when the power is exercised, as here, a real basis exists for suspecting that the Court of Appeals re-examined evidence as forbidden by the Seventh Amendment. With this being the case, does not this Court for reason of fairness to the trial judge and a prudent exercise of this Court's supervisory jurisdiction require the granting of certiorari to review the handiwork of the Court of Appeals? We note that a petition for certiorari is presently pending before this Court in *Breece* v. *J. F. Chapman & Sons, Inc.* (3 Cir., 1962) 302 F2d 581, where the Court

of Appeals for the Third District reversed in the face of the District Court's denial of motion for judgment n.o.v.

6. A conflict exists between the Court of Appeals for the Second Circuit in *Pierce Consulting Eng. Co.* v. *City of Burlington, Vt.* (2 Cir., 1955) 221 F2d 607, and the Court of Appeals for the Eighth Circuit in *Coca-Cola Bottling Co. of Black Hills* v. *Hubbard* (8 Cir., 1951) 186 F2d 148, as to whether the "law of the case" as established by unchallenged instructions to the jury must be accepted in deciding whether the evidence is sufficient to make a question for the jury. The Second Circuit says "yes" and the Eighth Circuit says "no". We have found no case of either this Court or the Court of Appeals for the Ninth Circuit precisely in point. In the case at bar, as will be shown, the Court of Appeals ran counter to the "law of the case". By resolving the conflict in the Second and Eighth Circuits this Court may also give direction to the Ninth and other circuits on this important application of established law.

7. The Court of Appeals also held contrary to the law of Washington as expressed in *Western Asphalt Co.* v. *Valle* (1946) 25 Wn2d 428, 171 P2d 159. That case held that where a general contractor requests sub-bid figures from a subcontractor, uses them in his own bid for a prime contract and, after being declared the low bidder, tells the subcontractor that his figures were used, it became a question for the jury as to whether or not an implied-in-fact contract existed.[11] With local law as

[11] The Washington Supreme Court held that the facts presented a jury question as to whether an implied-in-fact contract

directly in point, the Court of Appeals under the *Erie* doctrine was required to follow this Washington law. It did not. The fact that the Washington law as expressed in *Milone & Tucci, Inc.* v. *Bona Fide Builders, Inc.* (1956) 49 Wn2d 363, 301 P2d 759, held that mere use of a subcontractor's bid by a general contractor was not in itself sufficient evidence of acceptance, did not excuse the Court of Appeals from following the *Western Asphalt* case. At most, these two cases made the Washington law doubtful which required the Court of Appeals for that reason alone to follow the permissible views of the able trial judge, which it did not do. *Illinois Terminal R. Co.* v. *Creek* (8 Cir., 1953) 207 F2d 475, 479.

8. The basic transaction which occurred in the case at bar is typical of what occurs every day in the contracting trade across the nation. A subcontractor bids to a general contractor, and the general contractor so armed in turn bids to the "owner" for the prime contract. If the general contractor is found low bidder for the prime contract, it is implicit that, having used the subcontractor's bid, when he is awarded the general contract the general contractor, in turn, will issue a purchase order to the subcontractor. Customarily, the informing of the subcontractor that his bid has been used or that he has been named by the general contractor strikes the bar-

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was created. The fact that there the plaintiff sought an implied-in-fact contract to pay for services rendered in furnishing the sub-bid measured by the profits of the job instead of an implied-in-fact acceptance of the sub-bid as an offer is to our way of thinking, and apparently the trial judge, as well, a difference without a distinction. See *Hill* v. *Waxberg* (9 Cir., 1956) 237 F.2d 936.

gain (R. 313). Yet, the legal effect of the use of a subcontractor's bid has long been a troublesome problem. Until reversed, the case at bar stood as a significant reminder that after the general contractor uses and benefits by a subcontractor's bid, he cannot lead the subcontractor to believe for almost five months that he has accepted the offer and that the perfunctory purchase order will be later issued and then cast him aside for selfish and extraneous reasons. Until reversed, the case at bar did more to promote fair dealing in the unregulated contracting trade than the Fair Trade Commission ever accomplished in supervising fair dealing in the regulated phases of our business economy. So little is required by this Court and so much to be gained for the contracting trade as a whole by a correct decision in this case that the Court should grant certiorari.

Specific conclusions reached by the Court of Appeals indicated that it overran the jury on the facts and the trial judge upon questions of local law.

Had the Court of Appeals desired it could have found from the evidence in the record as epitomized in our Statement of the Case that the jury acted with reason in concluding that Respondent's officers and agents by their words and conduct were accepting Petitioner's offer and not merely intending to contract in the future.

For instance, Respondent was surely not manifesting an intent to contract in the future and not the present when on July 25, 1956, it told Petitioner that it could proceed with shop drawings (the first step in perform-

ance) (R. 188), and also that Petitioner would be furnishing the draft tube gates (R. 183); or when, as early as March 12, immediately after Respondent had been declared low bidder for the prime contract, its Project Manager with authority to speak (R. 162) told a Captain Russell, manager of a barge lines, that Petitioner would supply the spillway gates (R. 163); or when as late as August 2 (eight days before repudiation) Respondent wrote a Seattle business firm and advised:

> "* * * the following list of suppliers is furnished to you: * * Spillway Tainter Gates by Gunderson Bros. of Portland, Oregon. * * * Spillway bridges has not been determined yet." (R. 387, P. Ex. 8).

Mention of the above evidence in support of the jury's verdict was conspicuously absent from the Court of Appeals' opinion. Within a week of its decision in the case at bar, this very same Court of Appeals was reversed by this Court in *Continental Ore Co.* v. *Union Carbide* (June 25, 1962) 370 US 690, for likewise overlooking in review of an anti-trust suit certain evidence from which the jury could have found that defendant's anti-trust violations caused plaintiff's damages. A court's persistent deprivation of its litigants' rights to a trial by jury is in itself an important reason for granting certiorari. *Rogers* v. *Missouri P.R. Co.* (1957) 352 US 500.

Instead of looking for evidence and inferences therefrom to support the verdict, the Court of Appeals became bent upon finding only one possible view of the evidence though others existed. It opened its opinion with a broadside into the realm of fact by stating:

> "The material facts are substantially undisputed."

and eight pages later concluded its opinion by finding contrary to the jury upon the crucial factual issue:

> "* * * MCS certainly manifested an intention to enter into a contract with Gunderson at some time in the future, and MCS may very well have taken advantage of Gunderson, but contract with Gunderson it did not." (p. A10).

Triers of fact, in this case the jury, are constantly called upon to determine the intent with which a person acted. As Mr. Justice Vinson observed in *Commissioner* v. *Culbertson* (1948) 337 US 733 in note at 743:

> "Nearly three-quarters of a century ago, Bowen, L. J., made the classic statement that 'the state of a man's mind is as much a fact as the state of his digestion.'"

See: *Standard Oil Co.* v. *Lyons* (8 Cir, 1942) 13 F2d 935; and *Smith* v. *Onyx Oil and Chemical Co.* (2 Cir 1955), 218 F2d 104.

Upon the factual issue of the intent of a person's acts the Supreme Court of Washington will not substitute its findings for those of the trier of the facts in the court below and neither should have the Court of Appeals. *Kaufman* v. *Kaufman* (June 8, 1962) 160 Wn Dec (Adv) No. 1, p. 1.

In another instance, the Court of Appeals was so intent upon its single purpose that it re-examined a fact based upon conflicting evidence when it pointed to one of Petitioner's letters (R. 405) to support its statement:

> "In his letter, Mr. Gunderson neither insisted nor inferred that a contract * * * existed between the parties." (p. A5).

to ignore two other letters of Petitioner in which it insisted that a contact existed and was breached by Respondent (R. 414 and R. 421).

In still another instance, pertaining to the March 26 telephone conversation, wherein Petitioner was advised:

> "As you probably know by now, your name was used in our bid for furnishing of the spillway gates for the Priest Rapids project." (R. 105).

The Court of Appeals took an untenable position when it stated:

> "* * * the only inference possible is that the parties were still bargaining." (p. A9).

Petitioner's participant to that conversation testified that he understood from the conversation that Petitioner had the spillway gate job (R. 169). A prominent general contractor of Washington also testified under oath (but in an offer of proof which was excluded from the jury) that the expressions of Respondent in that telephone conversation under the custom of the trade implied acceptance of Petitioner's offer (R. 313). The conversation and circumstances under which it was made permitted the jury to reasonably reach the same understanding as the prominent general contractor even though the jury did not have the benefit of his testimony concerning customs of the trade.

In two important instances to find facts contrary to the jury the Court of Appeals went beyond the law of Washington and the "law of the case" upon which the jury was instructed by the trial judge.

First: The evidence showed that Petitioner was named by Respondent as the supplier of all of the equipment in two bid items although in Petitioner's offer it had only offered to supply most but not quite all of each item. In this regard the jury was instructed that it was for it to determine whether Respondent's expressions of assent changed the terms of the offer in any material respect so as to amount to a counteroffer, or whether such expressions were as broad as the offer in order to amount to an acceptance (R. 684). In light of those instructions it was entirely reasonable for the jury to have found, as it did, that the Respondent's manner of naming petitioner as supplier of the whole of both bid items was not inconsistent with the offer but at most immaterially broader than the offer; hence a manifestation of assent. However, the Court of Appeals again took the ball and ran it out of bounds when it stated:

> "In addition, the *manner* of use by MCS negates the conclusion that such amounted to acceptance." (Italics by the Court of Appeals) (p. A7).

Second: Petitioner's theory was that Respondent's manifestations of acceptance consisted of more than the mere use by it of Petitioner's offer and for that reason the case was not controlled by *Milone & Tucci, Inc.*, v. *Bona Fide Builders, Inc.* (1956) 49 Wn2d 363, 301 P2d 759 wherein it was held that the mere use of the bid, in and of itself, did not evidence its acceptance. Petitioner contended that the reasonable inferences from all of the evidence, including the use of the bid and particularly the communication of the fact of

its use to Petitioner, made a question for the jury as to whether an implied-in-fact, if not an express contract, came into being. A jury question was created in this case under the holding in *Western Asphalt Co.* v. *Valle* (1946) 25 Wn.2d 428, 171 P.2d 159, not to mention *De Britz* v. *Sylvia* (1944) 25 Wn.2d 428, 171 P.2d 159 and *Freimuth* v. *Glens Falls Insurance Co.* (1957) 50 Wn.2d 621, 314 P.2d 468. The able trial judge in his search for the law reconciled the above decisions and instructed the jury that the law of Washington was as follows:

> "You are instructed that the evidence discloses that defendant put the name of plaintiff in its bid as the supplier of the gates and hoists in Bid Item 8.1A. Such fact alone is not evidence of a completed contract between the parties but may be considered by you with all of the other evidence in the case in making your determination whether there was a complete offer and acceptance and a meeting of the minds in order to constitute a bilateral contract." (R. 687).

Not content with the views of the trial judge as to the law of Washington as above expressed the Court of Appeals, contrary to the *Erie* doctrine, created its own local law in order to reach a conclusion that the evidence was insufficient when it stated:

> "Gunderson also invites this court to hold that the unsolicited communication of March 26, 1956, advising Gunderson that its bid was used, is a circumstance which carries this case beyond the restrictive confines of the *Milone* case, supra. We decline to so hold. Communication of a fact, unsolicited or otherwise, which does not amount to acceptance, cannot, by virtue of such communication, become an acceptance." (p. A8).

From the above statement the Court of Appeals demonstrated not only its improper refusal to give consideration to the trial judge's permissible views of the law of Washington, *Illinois Terminal R. Co. v. Creek* (8 Cir, 1953) 207 F.2d 475, 479 but also its unwillingness to recognize that the jury with reason could have found acceptance from inferences drawn from the circumstance of the communication of the fact of use of the offer and the other evidence in the case. i.e. A general contractor after being found low bidder ordinarily does not make a particular request of a sub-contractor, who has offered to furnish spillway gates to also furnish hoists, unless he is satisfied with the spillway gate offer. Nor, unless he is satisfied with the offer as it stands, does he agree that a quotation on hoists shall be kept separate and apart from the gates. Nor, does he make a 3,000 mile telephone call to advise a sub-contractor that his name (and offer) had been used unless to express in contractor's parlance satisfaction and acceptance of the offer.

From what we have but fleetingly pointed out, it is clear that the Court of Appeals came as surely into collision with the Seventh Amendment as did the Court of Appeals for the Third Circuit in *Atlantic and Gulf Stevedores* v. *Ellerman Lines* (April 2, 1962) 369 U.S. 355 wherein this Court in a diversity action for breach of an implied-in-fact warranty in a maritime contract for the same reason granted certiorari and reversed.

By the same token, the Court of Appeals found facts contrary to the jury just as improperly as did the Court of Appeals for the Eighth Circuit in *Dick* v. *New York*

Life Insurance Co. (1959) 359 U.S. 437 which was a diversity action upon a life insurance policy. There, this Court granted certiorari and reversed because the Eighth Circuit had concluded, contrary to permissible inferences of the jury, that a shotgun would not fire unless someone or something pulled the trigger.

Since the Seventh Amendment knows no favorites and since evidence of intent to contract is as delicate a factual issue for jury consideration as can ever be imagined, the following recent Jones Act and F.E.L.A. cases are well in point: *Michalic* v. *Cleveland Toulset, Inc.* (1960) 364 U.S.325; *Sentilles* v. *Inter-Caribbean Shipping Corp.*, (1959) 361 U.S. 107; *Senko* v. *La Crosse Dredging Corp.*, (1957) 352 U.S. 370. After all, fact finding does not require mathematical certainty. *Schultz* v. *Pennsylvania Railroad Co.*, (1956) 350 U.S. 523.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit should be granted and the judgment reversed.

Respectfully submitted,

WILLIAM F. WHITE,
1200 Jackson Tower,
Portland, Oregon,
CAMERON SHERWOOD,
Baker Building,
Walla Walla, Washington.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MERRITT-CHAPMAN AND SCOTT CORP., a Delaware Corporation, *Appellant*,

vs.

GUNDERSON BROS. ENGINEERING CORP., an Oregon Corporation, *Appellee*.

No. 17,575

June 19, 1962

On Appeal from the United States District Court for the Eastern District of Washington

Before: HAMLIN and MERRILL, Circuit Judges, and BEEKS, District Judge:

The appeal in this diversity case tests the correctness of the trial court's determination that there was evidence from which the jury could find that a contract existed between appellant (MCS) and respondent (Gunderson).

The material facts are substantially undisputed. Early in 1956, Public Utility District No. 2 of Grant County, Washington (P.U.D.), advertised for bids to construct Priest Rapids Dam on the Columbia River at Ephrata, Washington.[1] Prior to March 10, 1956, MCS

[1] Instructions to bidders gave notice (1) that the project was to be financed by the sale of bonds and thus no contract would be executed until a predetermined percentage thereof had been sold; (2) that each bidder should submit detailed drawings to the project engineer, Harza Engineering Company, who would have final say with respect thereto, including changes if deemed neces-

informed Gunderson that it was preparing to bid as general contractor on Priest Rapids Dam. MCS requested Gunderson to bid on several parts of the project, including Items 8.1 and 8.6, which concerned spillway and draft tube gates.[2]

In response to this request, Gunderson on March 10, 1956, submitted a written quotation which was, so far as material here, substantially as follows: Item 8.1: Deliver F.O.B. barge, nearest navigable point to job site, 22 spillway gates, less hoists, anchorages and embedded materials for the lump sum of $1,093,004.00. Item 8.6: Deliver in same manner 6 draft tube gates for a price of $80,032.00. Under each heading, there was also a lesser figure for rail delivery.[3] The quotation provided that prices would be based upon current shop labor rates and material costs; any increase in either would be charged to the account of the purchaser; de-

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sary, such changes being without cost to P.U.D.; (3) that the final contract would contain a bonus-penalty provision of $1,300.00 and $3,000.00 a day, respectively, with 1900 days from commencement being the crucial date; and (4) that construction or fabricating work done prior to approval of drawings would be at contractor's risk.

[2] Item 8.1 called for a lump sum price on "the design and manufacture of twenty-two (22) spillway gates and hoists; consisting of twenty-one (21) spillway tail gates and one (1) tainter sluice gate, each complete with seals, guide rollers, guides and anchorages, including the prestressing cables, their fittings, the rigid conduit in which they are to be placed and all necessary equipment required to pretension and measure the stresses in the prestressing cables in the field, and the hoisting equipment for the gates."

Item 8.6 asked for a lump sum price on six (6) draft tube gates, and the necessary appurtenances.

[3] Gunderson quoted water delivery prices exclusively to MCS. Prior to the bid, it had been mutually determined that while rail delivery was cheaper, water delivery would save several times the difference in MCS's erection costs.

livery was to be contingent upon availability of steel; MCS was requested to assist in procuring steel if such became a problem; and finally, the quotation stated that Gunderson would not be accountable for increases in costs, if any, due to changes in design made by P.U.D.[4]

In bidding the prime job, MCS used the quotation submitted by Gunderson. Further, it named Gunderson as the supplier of *all* of the equipment specified in Items 8.1 and 8.6. When the project bids were opened on March 12, 1956, in Ephrata, MCS was low bidder for construction of the dam which fact, together with the fact that Gunderson's bid had been used by MCS, soon became known to Gunderson.[5]

On March 26, 1956, Mr. Meyers of MCS called Mr. Howe of Gunderson, saying: "As you probably know by now, your name [Gunderson's] was used in our bid for furnishing of the spillway gates for the Priest Rapids project." There was additional conversation concerning those parts of Item 8.1 that Gunderson had omitted in its quotation. MCS was particularly interested in hav-

[4] It is apparent that on March 10 Gunderson did not propose to furnish all of the equipment upon which MCS requested a bid. There is testimony in the record to the effect that due to the short amount of time in which Gunderson had to prepare its bid, it was unable to marshal data with respect to those items not quoted. There is also testimony to the effect that MCS wanted one subcontractor to provide and be responsible for the entire spillway gate system, the apparent reason being that MCS would have to guarantee the job and wished to have responsibility unified as much as possible.

[5] Mr. Jenks, Project Manager for MCS, advised a Captain Lew Russell, Jr. of these two facts on March 12, 1956. Gunderson was so informed by Captain Russell. There was nothing secret about these facts and the information was generally known by those interested in the project.

ing Gunderson supply the hoists which were to be utilized in opening and closing the spillway gates. Howe informed Meyers that Gunderson could supply hoists but only through another company, that is, Gunderson would purchase the hoists and resell them to MCS for a reasonable profit. Further, Howe said that the hoists would have to be considered separate and apart from the spillway gates.

Gunderson contends that this conversation constituted acceptance of its bid.

Shortly after this communication, Gunderson was also requested to quote figures on trunnion anchorages for the spillway gates. Gunderson eventually supplied this quotation.

In early June, Howe of Gunderson telephoned Mr. Owens of MCS and asked for a letter of intent which was to assist Gunderson in acquiring steel. Because any such letter would necessarily be contingent upon award of the prime contract, it was determined that the matter be dropped for the time being. Howe was also advised some time later that purchase orders, when ready, would be issued from the Ephrata office of MCS. This conduct is alleged as an alternative instance of acceptance by MCS.[6]

On July 9, 1956, the prime contract between MCS and P.U.D. was executed. Incorporated therein were the

[6] With respect to purchase orders, on July 30, 1956, either Meyers or Owens told Gunderson: "It looks like you people have the job. However, the purchase order will come out of the field office and we are disappointed you didn't bid on hoists."

bids made by Gunderson to MCS on Items 8.1 and 8.6. Gunderson was named as supplier of *all* of the equipment in the two items although it had only offered to supply part of it. Gunderson also urges this circumstance as an acceptance by MCS.

By this time it became important for MCS to finalize arrangements with its suppliers. Jenks of MCS met with Howe to discuss the question of hoists, anchorages and embedded material which had been omitted in Gunderson's initial quotation. The subject of escalation was also discussed. A series of negotiations followed concerning these subjects with proposals being made by each side.[7]

On August 10, 1956, Gunderson was advised that the spillway orders were placed with another supplier. Shortly thereafter, Mr. A. E. Gunderson, Vice President of Gunderson, wrote to MCS reviewing the facts and requesting reimbursement for the expenses incurred in preparing its bid. In his letter, Mr. Gunderson neither insisted nor inferred that a contract for Items 8.1 and 8.6 existed between the parties. No mutually satisfactory arrangements having been made, this litigation followed.

The jury found for Gunderson and assessed its damages at $98,398.10. This appeal is taken from the final

[7] MCS wanted a firm price on the items in question. Gunderson offered to eliminate escalation but insisted on an increased overall price in return. Additions to Item 8.6 were discussed and bids therefor were submitted. The meaning of "embedded materials" was discussed and the cost of adding this item to the bid was submitted by Gunderson. Gunderson offered to split the added cost with MCS.

judgment entered thereon from denial of MCS's motion for judgment notwithstanding the verdict and in the alternative for a new trial.

The principal thrust of the appeal by MCS is two-fold: First, that Gunderson's quotation of March 10, 1956, was not a legal offer because of indefiniteness, and second, that even if the offer be considered valid, it was never accepted. For the purpose of further discussion, we assume arguendo, that the offer was capable of being accepted.

Gundersons' argument for acceptance is quadrigeminal: (1) Use of its bid by MCS, plus unsolicited communication of that fact, (2) use of its name and bid by MCS in the prime contract between MCS and P.U.D., (3) conduct by MCS with respect to the proposed letter of intent and purchase order, and (4) publication by MCS of the fact that MCS used the bid.

Offer and acceptance are tools by which courts and contract negotiators arrive at the illusive contractual concept of "a meeting of the minds." The query is uniformly: Did the parties agree upon the same thing at the same time? It is our opinion that in this case they did not.

At the outset, it is clear that in Washington use of a bid by a prime contractor is not the legal equivalent of acceptance. *Milone and Tucci, Inc.* v. *Bona Fide Builders, Inc.*, 49 Wn.2d 363, 301 P.2d 759. In that case, a sub-contractor submitted a bid which was used by the prime contractor in its bid on a Government building project. Thereafter the sub-contract was awarded

to a third party. The court reversed a judgment in favor of the sub-contractor for breach of contract, saying at page 368:

> "Did defendant's use of plaintiff's offer, in its bid upon the prime contract, constitute an acceptance thereof, conditioned only upon the prime contract being awarded to defendant? We think not."

Thus, mere use of Gunderson's bid was not an acceptance thereof.

In addition, the *manner* of use by MCS negates the conclusion that such amounted to acceptance. To constitute acceptance, an offeree's manifestations of assent must be strictly within the terms of the offer.[8] The facts here indicate something which materially differs from this basic requirement. When MCS submitted its bid to P.U.D. it named Gunderson as supplier of "Spillway Gates and Hoists," "Draft Tube Gates," and "Frames and Guides for Draft Tube Gates." Gunderson's bid,

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[8] The basic rules governing requisites of acceptance have been well defined by the Supreme Court of Washington. A concise summary thereof, together with exhaustive authority, is found in *Contracts in Washington* 1937-1957, Vol. 34, Wn. L.Rev. p. 42:

> "The principle which demands of an offeree precise and literal compliance with the requirements of the offer is generally and in Washington thought to be both fundamental and inflexible. Nothing else or less can be an acceptance; the power created by an offer is a strictly limited one, to be exercised only within the confines of the offeror's request. If the offeror asked for a promise, he is entitled to exactly that promise in unequivocal language (or to reasonable rendition or tender of the offeree's performance); if he asks for an act, he is entitled to exactly that act. An offeree who chooses to respond in some other way may in doing so make a counteroffer; he does not accept. Negotiations, however protracted, come to nothing if the parties cling to positions which never coincide."

See, also, *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn. 2d 109, 173 P.2d 194; *Schuehle v. Schuehle*, 21 Wn. 2d 609, 152 P.2d 608.

however, merely offered to supply spillway gates "*less hoists and anchorages*" and "draft tube gates" with no mention of frames and guides therefor. "Embedded material," the meaning of which caused some disagreement, was specifically excluded. At best, this use came to nothing more than a counter-offer. Use of Gunderson's name in the prime contract is of no greater significance, and such conduct by MCS likewise falls short of acceptance. Again, MCS added to the offer by reciting that Gunderson would supply "structural anchorages." In short, Gunderson offered to supply a portion of Items 8.1 and 8.6. Use of that offer by MCS, viewed in its most favorable light, indicates nothing more than that acceptance would only be on some basis other than the offer.

The further contention that MCS "promised" P.U.D. that Gunderson would supply these items is also without merit. Gunderson makes no claim on the theory of third party beneficiary, and such a claim could not be sustained in law. It was not the intention of MCS and P.U.D. to benefit Gunderson by their contract and such intention is one of the elements which a purported third party beneficiary must show to establish his status as such. *Pacific Mercantile Agency* v. *First National Bank of Ferndale,* 187 Wash. 149, 60 P.2d 6.

Gunderson also invites this court to hold that the unsolicited communication of March 26, 1956, advising Gunderson that its bid was used, is a circumstance which carries this case beyond the restrictive confines of the *Milone* case, supra. We decline to so hold. Communication of a fact, unsolicited or otherwise, which

does not amount to acceptance, cannot, by virtue of such communication, become an acceptance. Also, what Gunderson "understood" from the conversation can have no greater legal significance than that which is revealed by the actual transactions between the parties. The conversation of March 26, 1956, must be viewed in its entirety and the only inference possible is that the parties were still bargaining.

Gunderson further contends that certain conversations relating to a "promised" purchase order and letter of intent constituted acceptance of its bid. No such documents were ever forthcoming. A promise to contract, or a promise to place an order in the future, is certainly nothing more than negotiation. *Owens-Corning Fiberglas Corporation* v. *Fox Smith Sheet Metal Company*, 56 Wn.2d 167, 351 P.2d 516. It is noteworthy that in the *Owens-Corning* case, the sub-contractor (who, vis-a-vis the present situation, was being sued for breach) had already rendered part of the required performance. Gunderson's reverse argument that the purchase order was merely meant to "formalize" the bargain which was struck on March 26, 1956, falls of its own weight in view of our prior discussion. Of the proposed purchase order and letter of intent, we can say that conversations in reference thereto indicated, at best, nothing more than an intention on the part of MCS to contract with Gunderson at some future date.

Finally, Gunderson contends that MCS accepted its bid when it "told the world" that Gunderson's bid figures were used. For reasons previously mentioned, this argument is untenable.

This case bristles with indicia of negotiation. In the very first instance of contract between the parties after the offer was made, MCS proposed an arrangement considerably different than that which was submitted by Gunderson. From that point on, all further contact between litigants came to nothing more than offers and counter-offers. MCS certainly manifested an intention to enter into a contract with Gunderson at some time in the future, and MCS may very well have taken advantage of Gunderson, but contract with Gunderson it did not.

The motion for judgment notwithstanding the verdict should have been granted, and the complaint should have been granted, and the complaint should have been dismissed.

Reversed.

(Endorsed) Opinion Filed June 19, 1962.

FRANK H. SCHMID, Clerk.

(R. 726).

Petition for a Rehearing filed July 17, 1962, and denied by the Court of Appeals on August 13, 1962 (R. 735).

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

GUNDERSON BROS. ENGINEERING CORP., an Oregon corporation, Plaintiff	)
vs	) Civil No. 1792
MERRITT-CHAPMAN & SCOTT CORPORATION, a Delaware corporation, Defendant	)

OPINION ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

This is a contract action. The plaintiff maintains that it submitted bids on a sub-contract for the construction of a phase of Priest Rapids Dam and that the defendant accepted the bid and its words and actions constituted an acceptance of the offer made by the plaintiff.

The defendant denies that such occurred and maintains that there was no contract or meeting of the minds.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

The first question to be determined is whether there was substantial evidence to support the verdict of the jury. At this stage of the case, in support of the verdict,

the plaintiff is entitled to all reasonable inferences that may be indulged from the evidence received. Since the existence or non-existence of a contract between the plaintiff and defendant was a question of fact for the jury, it is my conclusion that the jury verdict is controlling if there is substantial evidence to support it.

There was testimony that tended to prove the parties were conducting further negotiations which would negative a contract. There was likewise evidence that the defendant had accepted the bid of the plaintiff and considered that there was a binding contract. The defendant stated to the owner, Public Utility District No. 2 of Grant County, that Gunderson would furnish the spillway gates.

After considering the record, my notes, and arguments of counsel, it is my conclusion that there was substantial evidence to sustain the verdict of the jury and therefore that the motion for judgment notwithstanding the verdict should be denied.

MOTION FOR NEW TRIAL

The Motion for New Trial is urged on three principal grounds. First, that there was error in permitting evidence to be introduced by certain witnesses as to their understanding of certain conversations. Second, that the Court erred in refusing to admit evidence by the defendant of the business practices of the defendant corporation, and the intention of the corporation as evidenced by the business practices, and third, that the statute of frauds applied and that the jury should have

passed upon the question as to whether the contract was one that by its terms could be performed within one year.

A question was presented in the case as to whether custom and usage and practice in the trade could be utilized to evidence a contract, and my conclusion was at that time, and still is, that custom and practice may give evidence of the reasonableness of the terms of a contract but cannot be used to establish a contract. Likewise, it is my conclusion that custom and practice on the part of the defendant corporation could not be utilized, particularly a business practice of the defendant not shown to have been known to the plaintiff.

As a corollary it seems to me that the witnesses themselves may testify as to what their particular understanding of a certain conversation may have been. This is the understanding of an individual and my recollection is that no testimony was rejected when offered by the defendant showing or tending to show the understanding of an individual witness of the defendant corporation.

The understanding or business practice of the defendant corporation, however, stands on an entirely different footing and I therefore conclude that no error was committed either in the receipt or rejection of testimony in this phase of the case.

The defendant further asserts that the statute of frauds applied in this case and that the contract by its terms could not be performed within one year. Further,

the defendant states that the question was one for the jury and not one for the determination of the Court.

In this case I do not recall the defendant having requested any instructions under which the question of the statute of frauds would have been submitted to the jury. Failing in such request it is my conclusion that no error can attach in this particular phase of the case.

I have concluded that the question of whether or not this contract is one to be performed wtihin one year must be determined by the Court as a matter of law and is not a question which a jury should determine or on which the jury should speculate. It is peculiarly a question to be dealt with from the standpoint of the applicable law involved and not a question of fact for jury determination. I have decided that the contract was one which could be performed within one year and therefore not barred by the statute of frauds. Gronvold v. Whaley, 39 Wn. (2d) 710, 717, 237 P. (2d) 1026.

I have considered all of the defendant's arguments in support of its Motion for New Trial. I do not believe that substantial justice requires any action on my part to set aside the verdict. The jury was, in my opinion, correctly instructed, and they returned their verdict on disputed evidence on questions of fact.

CONCLUSION

From the foregoing it is my conclusion that the Motion for Judgment Notwithstanding the Verdict and the Motion for New Trial should both be denied. An

order may be submitted in accordance herewith.

DATED this 31st day of May, 1961.

CHARLES L. POWELL
United States District Judge

[Endorsed]: Filed June 2, 1961
(R. 29)

Office-Supreme Court, U.S.
FILED
NOV 26 1962
JOHN F. DAVIS, CLERK

No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1962

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon corporation,

Petitioner,

v.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BENJAMIN H. KIZER,
Spokane 1, Washington
1224 Old National Bank Building

GERALD DEGARMO
1308-1320 Northern Life Tower
Seattle 1, Washington

Attorneys for Respondent

KIZER, GAISER, STOEVE, LAYMAN & POWELL
ALLEN, DEGARMO & LEEDY
MANNING, HOLLINGER & SHEA
GLICKSTEIN, CRENSHAW, GLICKSTEIN & HULSEY

Of Counsel

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TABLE OF CONTENTS

	Page
Statement of the Case	1
Argument	4
1. Petition Presents No Issue Warranting Review by This Court	4
2. Petitioner Ignores the Law of Contract. (Petitioner's Point 2)	5
3. Petitioner Praises Ninth Court of Appeals But — (Petitioner's Point 3)	10
4. Petitioner Objects to District Judge. (Petitioner's Point 4)	11
5. Petitioner Claims Violation of Seventh Amendment. (Petitioner's Point 5)	12
6. Petitioner Claims Conflict Between Circuits (Petitioner's Point 6)	15
7. Petitioner Urges That Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P. 2d 195, Disregarded by Court of Appeals. (Petitioner's Point 7)	17
8. Petitioner Urges Milone v. Bona Fide Builders Merely Makes Washington Law Doubtful. (Petitioner's Point 8, pp. 17-18)	19
9. Petitioner Argues Its Evidence Made Case for Jury. (Petitioner's Point 8, pp. 18-21)	20

TABLE OF CONTENTS (Cont'd)

Page

10. Petitioner Urges an Implied-in-Fact Contract. (Petitioner's Point 8, pp. 22-24) ... 21

11. Was Respondent's "Unsolicited Communication" of Use of Bid an Acceptance? (Pet. Br., pp. 22-23) ... 23

Conclusion ... 25

TABLE OF AUTHORITIES

Arnold v. Sanstol, 43 Wash. 2d 94, 260 P. 2d 327. ... 22

Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355 ... 25

Baker v. Johnson County, 37 Ia. 186 ... 7

Baltimore & Carolina Line v. Redman, 295 U.S. 654, 659 (1935) ... 14

Bell v. Ralston Purina Co., 257 F. 2d 31 (1958) ... 6

Berkovitch v. Luketa, 49 Wash. 2d 433, 302 P. 2d 211 ... 22

Black v. Sinclair O. & G. Co., 294 F. 2d 580 (5th Cir., 1961) cert. den'd 369 U.S. 849 ... 14

Blackiston v. Osgood Panel & V. Co., 173 Wash. 435, 23 P. 2d 397 ... 8

Page

Blue Mountain Const. Co. v. Grant Co. School Dist., 49 Wash. 2d 685, 306 P. 2d 209 8

Breece v. Chapman & Sons, 302 F. 2d 581 13

Chandler v. Washington Toll Bridge Authority, 17 Wash. 2d 591, 137 P. 2d 97 22

Citizen's Nat'l. Bank v. Ariss, 68 Wash. 448, 123 P. 593 8

Coca Cola B. Co. v. Hubbard, 203 F. 2d 859 (8th Cir.) 16

Cone v. West Va. Paper & Pulp Co., 330 U.S. 212 12

Dick v. New York Life Ins. Co., 359 U.S. 437 5

Evans v. Ely, 13 F 2d 62, 64 6

Falconer v. Safeway Stores, Inc., 49 Wash. 2d 478, 303 P. 2d 294 22

Ferris v. Blumhardt, 48 Wash. 2d 395, 293 P. 2d 935 8

Firemen's Ins. Co. v. Robbins Coal Co., 288 F. 2d 349 (5th Cir., 1961), cert den'd. 368 U.S. 875 15

Gardner v. Seymour, 27 Wash. 2d 802, 180 P. 2d 564 23

General Accident F. & L. A. Corp. v. Smith and Oby Co., 272 F. 2d 581, 583 10

Gunning v. Cooley, 281 U.S. 90, 94 (1930) 14

TABLE OF AUTHORITIES (Cont'd)

	Page
Johnson v. Union Pacific R. Co., 233 F. 2d 427, rev'd 352 U.S. 957	5
Kellogg v. Gleeson, 27 Wash 2d 501, 505, 178 P. 2d 969	19
Kuh v. Lemcke, 107 Wash. 45, 180 P. 889	7
Lee v. Jenkins Bros., 268 F. 2d 357 (2nd Cir. 1959)	14
Loewi v. Long, 76 Wash. 480, 136 P. 673	8
Lost Lake Lumber Co. v. Smith, 29 Wash. 713, 70 P. 134	8
Lyons v. Empresa Hondurena De Vapores S.A., 273 F. 2d 317, 319 (2nd Cir. 1959)	16
Manaia v. Potomac Elec. Power Co., 268 F. 2d 793 (4th Cir., 1959) cert. den'd. 361 U.S. 913	15
Milone, etc. v. Bona Fide Builders, Inc., 49 Wash. 2d 363, 301 P. 2d 759	7, 17
Neel v. Henne, 30 Wash. 2d 24, 190 P. 2d 775	23
No. Carolina Nat. Gas. Corp. v. McJunkin Corp., 300 F. 2d 794 (4th Cir., 1961) cert den'd. Oct. 8, 1962, 31 U. S. L. U. 3117	14
Ohmer v. Allen, 79 F. 2d 942	6
Owens-Corning Fiberglass Corp. v. Fox Smith Sheet Metal Co., 56 Wash. 2d 167, 351 P. 2d 516	8

TABLE OF AUTHORITIES (Cont'd)

	Page
Pierce Cons. Co. v. Burlington, 221 F. 2d 607 (2nd Cir.)	16
R. J. Daum Const. Co. v. Child, Utah, 1952, 247 P. 2d 817, 820	24
Richards v. Kuppinger, 46 Wash. 2d 62, 66, 278 P. 2d 395	22
Ross v. Raymer, 32 Wash. 2d 128, 139, 201 P. 2d 129	20
Ruff v. Fruit Delivery Co., 22 Wash. 2d 708, 157 P. 2d 730	22
St. Paul & Tacoma Lumber Co. v. Fox., 26 Wash. 2d 109, 173 P. 2d 194	9
Sandeman v. Sayres, 50 Wash. 2d 539, 314 P. 2d 428	10
Schuehle v. Schuehle, 21 Wash. 2d 609, 152 P. 2d 608	10
Schulze v. General Electric Co., 108 Wash. 401, 184, P. 342	7
Senko v. LaCrosse Dredging Corp., 352 U. S. 370	25
Sillman v. Spokane S. & L. Assoc., 103 Wash. 619, 173 P. 296	8
Smith v. Reinaurer Oil Tr., Inc., 256 F. 2d 646 (1st Cir., 1958)	15

TABLE OF AUTHORITIES (Cont'd)

Page

Spooner v. Reserve Life Ins. Co.,
47 Wash. 2d 454, 287 P. 2d 735 10

State of Washington v. United States,
214 F. 2d 33, Cert. den'd 348 U.S. 802 10

Strange & Co. v. Puget Sound Depot,
176 Wash. 90, 28 P. 2d 111 8

Thomas H. Bringham v. Am. Bridge Co.,
39 Wash. 3, 80 P. 788 8

Trivette v. New York Life Ins. Co., 283 F. 2d 441
(6th Cir., 1960) cert. den'd 368 U.S. 838 ..... 11, 15

Troyer v. Fox, 162 Wash. 537, 554, 298 P. 733 22

Weldon v. Degan, 86 Wash. 442, 150 P. 1184 10

Western Asphalt Co. v. Valle,
25 Wash. 2d 428, 171 P. 2d 159 17

Williams v. Carolina Life Ins. Co.,
210 F. 2d 477, rev'd. 348 U.S. 802 5

Williams v. Favrit, 161 F. 2d,
822 (5th Cir., 1947) 24

STATUTES AND TEXTS

C. J. S., Vol. 17, p. 1271 6

Williston on Contracts, Rev. Ed., Vol. 1,
p. 49, Sec. 24 & p. 99, Sec. 37 9

In the Supreme Court
of the United States

OCTOBER TERM, 1962

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon corporation,

Petitioner,

v.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE

In addition to Petitioner's statement of the case, the following chronology of events occurring in the course of the negotiations, we believe, will be of critical aid to the Court in ascertaining that there was never at any time "a meeting of the minds" of the parties tending to form a binding contract.

1. On March 9, 1956, Gunderson by long distance phone made the first offer, to furnish gates, exclusive of hoists and anchorage for $1,015,844 f.o.b. rail. (Tr. 469, 470)

2. Later, on that day, by long distance Gunderson quoted a price of $74,032.00 f.o.b. rail for draft tube gates, but did not quote for the frames and guides for them (Tr. 472, 473)

3. On March 10, 1956 (Saturday), Gunderson mailed from Portland to Respondent at Spokane its written quotation. This was not a firm offer, but was qualified in several respects, in particular with reference to prices, where Petitioner introduced the following "escalator" clause:

> " . . . prices based upon current shop labor rates and material costs. Any increase in either will be charged to the account of the purchaser . . . "

At the bottom of the quotation is the following phrase: "no embedded material." (Tr. 66-70)

This was not received by Respondent until it had submitted its bid on the general contract, which was formally opened at Ephrata, Washington, on Monday, March 12, 1956. (Tr. 472, 473)

4. On April 20, Gunderson offered to furnish the hoists for $727,050.00 (Tr. 137, 174). On July 18, Gunderson offered to furnish structural steel anchorages for $251,261.00. (Tr. 138, 140)

5. Shortly after July 18, Gunderson rewrote its original proposal eliminating the price escalator clause by adding $74,800.00 to the price of the tainter

gates and making other changes (Tr. 179-180, Tr. 192-193). This was objected to by Respondent's Washington representative (Tr. 259).

6. On July 30, Gunderson again added $50,000.00 to its total of bids to which the Washington representative of Respondent again remonstrated, "I don't know how New York [Respondent's headquarters] is going to look at this." (Tr. 190, 191)

7. After careful consideration of these various bids with their changes and price increases, on August 10, Respondent advised Gunderson by wire that the spillway gates order had been placed with another supplier. (Tr. 204, 205)

8. On receipt of this information, Gunderson wrote to Respondent a long letter setting forth that their engineering costs were substantial and concluded:

> "We have been placed to a great amount of expense in preparing our bid, and in view of all of the circumstances regarding our *negotiations* with your company, we feel that we should be reimbursed for same. [Emphasis added]
>
> "We should like very much to hear from you regarding your thoughts about this particular situation." (Tr. 406)

A prompt reply was made by Respondent to this letter whereupon Gunderson wrote a second letter (Tr. 417, 418) stating:

"At the conclusion of the conference you said you were forwarding the purchase order to New York for approval. I asked if it would be safe to proceed with drawings and material planning, and you said it would. You also said the New York office may request further price refinements, and you will recall I left the door open on this phase for further discussion. Therefore, our figures were not *necessarily* final figures as you state."
(Emphasis added)

ARGUMENT

1. Petition Presents No Issue Warranting Review by This Court.

Rule 19(1) of the Rules of this Courts reminds litigants and their counsel that "a review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted *only* where there are special and important reasons therefore." (Emphasis added) Rule 19(1)(b) indicates the general character of reasons that will be considered by the Court in deciding whether to grant review of a decision by a federal court of appeals.

The present case presents no special and important reasons of the type generally considerd necessary to justify the granting of a writ of certiorari. This case involves nothing more than a plea of a disappointed corporate litigant, that has lost in th Court of Appeals and now hopes it can somehow prevail upon this Court to re-examine and reverse the decision below.

even though the case involves (a) no conflict among circuits, (b) no decision in conflict with applicable state law, (c) no important federal question, (d) no departure from the accepted and usual course of judicial proceedings, and (e) no other significant question that ought to be resolved by this Court as matter of general public interest.

2. Petitioner Ignores the Law of Contract.

(Petitioner's Points?) Here, Petitioner has unwittingly disclosed the central weakness of its petition for the writ by the cases it thrusts into the foreground of its argument, beginning with *Williams v. Carolina Life Ins. Co.*, 210 F. 2d 477, rev'd 348 U.S. 802, and concluding with *Johnson v. Union Pacific R. Co.*, 233 F. 2d 427, rev'd 352 U.S. 957, to which should be added *Dick v. New York Life Ins. Co.*, 359 U.S. 437. Not one of these cases is concerned with the fundamental issue here presented — the adequacy of Petitioner's evidence to satisfy the legal requirements respecting offer and acceptance in the law of contracts.

On the contrary, all of these cases are concerned with the purely factual issues involving elements of dispute in negligence, insurance and FELA cases.

Furthermore, in this case, even after drawing all *inferences* from the evidence in favor of Petitioner, there was still insufficient evidence of a definite offer and a precise acceptance to go to the jury.

Where, as here, the facts are not in dispute, the question whether the parties have definitely reached a binding agreement upon the terms of a contract raises a question for the judgment of the Court, not for the verdict of the jury. On this fundamental distinction between the law governing these purely factual disputes and the basic principles of contract, the following from Volume 17 C.J.S., p. 1271, states hornbook law:

> "The question whether a certain or undisputed state of facts establishes a contract is one of law for the court. Thus, when the language relied on to establish an oral or a written contract is clear or undisputed, the question of its sufficiency is for the court."

In *Bell v. Ralston Purina Co.*, 257 F. 2d 31 (1958), where a dispute as to the existence of a contract was under discussion, the U. S. Court of Appeals (10th Cir.) stated the rule:

> "The establishment of a contract from a set of facts is a question of law for the court. 17 C.J.S., Contracts, §611."

To the same effect: *Ohmer v. Allen*, 79 F. 2d 942; *Evans v. Ely*, 13 F. 2d 62, 64; same case, 30 F. 2d 912.

But, more important is the fact that this rule has been adopted by the Supreme Court of the State of Washington, in which state the negotiations for the proposed contract were conducted and where the proposed contract was to be performed.

In *Schulze v. General Electric Co.*, 108 Wash. 401; 184 P. 342, the trial judge submitted to the jury the correspondence that plaintiff contended constituted a contract, and the jury found for the plaintiff. Reversing the trial court, the Washington Supreme Court held:

> "Where a transaction consisted wholly of letters and telegrams, whether the correspondence constituted a contract is a question for the court."

See, to same effect, *Kuh v. Lemcke*, 107 Wash. 45, 180 P. 889, and *Milone, etc. v. Bona Fide Builders, Inc.*, 49 Wash. 2d 363, 301 P. 2d 759.

These cases demonstrate that if Plaintiff's evidence in this case had been submitted to a jury by a trial judge of this state, the Supreme Court of Washington would unhesitatingly have reached the same result as did the Court of Appeals in this case.

Furthermore, the *Kuh* case quoted, and the *Schulze* case repeated, the language of *Baker v. Johnson County*, 37 Ia. 186, which is:

> "An offer by one party assented to by the other will generally constitute a contract, but the assent must comprehend the whole of the proposition, It must be exactly equal to its assent and terms and must not qualify them by any new matter."

The opinion of the Court of Appeals in this case demonstrates to a nicety the failure of the plaintiff

to make its assent "comprehend the whole of the proposition . . . to be exactly equal to its assent and terms . . ."

The Supreme Court of Washington has followed the universal rule that the minds of the parties must meet "on the same and exact of terms."

> "An acceptance of an offer must always be identical with the terms of the offer, or there is no meeting of the minds and no contract." *Owens-Corning Fiberglass Corp. v. Fox Smith Sheet Metal Co.*, 56 Wash. 2d 167, 351 P. 2d 516; *Blue Mountain Const. Co. v. Grant Co. School Dist.*, 49 Wash. 2d 685, 306 P. 2d 209; *Ferris v. Blumhardt*, 48 Wash. 2d 395, 293 P. 2d 935; *Thomas H. Bringham v. Am. Bridge Co.*, 39 Wash. 3, 80 P. 788.

See *Strange and Co. v. Puget Sound Depot*, 176 Wash. 90, 28 P. 2d 111; *Loewi v. Long*, 76 Wash. 480, 136 P. 673. The following further cases show how deeply rooted in the law of Washington is this principle of offer and acceptance, the adequacy of which is for the court to determine: *Lost Lake Lumber Co. v. Smith*, 29 Wash. 713, 70 P. 134; *Citizen's Nat'l Bank v. Arisa*, 68 Wash. 448, 123 P. 593; *Sillman v. Spokane S. & L. Assoc.*, 103 Wash. 619, 175 P. 296; *Blackiston v. Osgood Panel & V. Co.*, 173 Wash. 435, 23 P. 2d 397.

By contrast, it is significant that Petitioner so completely avoids any reference to these basic principles of the law of contracts and the cases elucidating them.

In the case of *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wash. 2d 109, 173 P. 2d 194, the Washington Supreme Court refused to enforce a claimed contract because the offer was so indefinite and uncertain that the Court was unable to determine what must be done to contstitute performance. The Court quoted with approval from Williston on Contracts, Rev. Ed., Vol. 1, p. 49, Sec. 24, as follows:

> "The chief requirement is that the promise shall be sufficiently certain in its terms to enable the court to understand what the promissor undertakes. Likewise an offer must state with the same certainty the act or promise which the offeror agrees to take in return for his promise if the offeree accepts; . . ."

And from p. 99, Sec. 37:

> " 'A lack of definiteness in an agreement may concern the time of performance, the price to be paid, work to be done, property to be transferred, or miscellaneous stipulations in the agreement. Especially a reservation to either party of a future untrammeled right to determine the nature of the performance, or a provision that some matter shall be settled by future agreement, has often caused a promise to be too indefinite for enforcement.' "

Thereupon, the Supreme Court held that certain conversations and correspondence between the parties constituted nothing more than "preliminary negotiations."

To the same effect, see *Schuehle v. Schuehle*, 21 Wash. 2d 609, 152 P. 2d 608; *Sandeman v. Sayres*, 50 Wash. 2d 539, 314 P. 2d 428; *Spooner v. Reserve Life Ins. Co.*, 47 Wash. 2d 454, 287 P. 2d 735; *Weldon v. Degan*, 86 Wash. 442, 150 P. 1184.

In *General Accident F. & L. A. Corp. v. Smith and Oby Co.*, 272 F. 2d 581, 583, the Sixth Circuit, dealing with the law of contracts and reversing the trial judge, found it necessary to point out that:

> "The vigorous conflict between the parties comes in the task of applying the agreed law to the agreed facts. Such an application of the law to the facts is a question of law." (Citing cases)

See, also, *State of Washington v. United States*, 214 F. 2d 33, (Cert. den'd 348 U. S. 802).

3. Petitioner Praises Ninth Court of Appeals But —

(Petitioner's Point 3). Petitioner returns to its original blurring of distinctions between merely factual disputes erroneously withheld from jury decisions and the question whether the evidence taken in its most favorable light discloses the making of a contract, by citing three more of its factual disputes as indicative of the fact that normally the Ninth Circuit favors jury trials in such cases. For reasons earlier discussed in this brief, this praise of the record of the Ninth Circuit, though no doubt deserved, seems strangely out of place, as does Petitioner's criticism

of the opinion in *Trivette v. New York Life Ins. Co.*, 283 F. 2d 441, in the teeth of the fact that your Honrs denied the writ in this case (368 U. S. 838).

4. Petitioner Objects to District Judge.

(Petitioner's Point 4) Counsel for Petitioner are so hard pressed for grounds on which to plant their application for the writ that, without citation of case or text to support them, they object at some length to the presence on the Court of Appeals of Washington District Judge Beeks (Pts. Br. 13-15) on the grounds that:

> "A district judge of one state would be in a position to 'second guess' the district judge of the same state who tried the case on matters of sufficiency of the evidence and local law."

Counsel for Petitioner even criticize the Chief Judge of the Court of Appeals, because, as they phrase it, it was his duty to see that:

> ". . . if a district judge is selected to sit upon the court, no possibility can exist for speculation as to where the court looked for guidance to local law."

Is it logical to suggest that a district judge is disqualified from sitting on the Court of Appeals when cases come before that court from his own state, because he knows the decisions of its courts, and that other district judges should be selected for their

ignorance of those decisions? Are we to place a premium on ignorance, and a discount upon knowledge? Truly, a strange paradox.

A number of answers to this specious argument will at once occur to this Court. But a conclusive answer is that Petitioner's counsel knew, far better than the Chief Judge, just the issues involved in this case and the fact that these issues would be determined by a court on which a district judge of Washington would be one of the members. If Petitioner's counsel thought it improper for a district judge of Washington to sit on the United States Court of Appeals while hearing the appeal from another district judge of that state, was it not incumbent upon them to raise that issue before argument? Can they be heard to raise that issue for the first time after the decision of the United States Court of Appeals has gone against them?

5. Petitioner Claims Violation of Seventh Amendment.

(Petitioner's Point 5). Petitioner ascends still further into the stratosphere when it cites *Cone v. West Va. Paper & Pulp Co.*, 330 U.S. 212, which holds that a U.S. Court of Appeals cannot grant judgment n.o.v. where such a motion was not initially made in the district court. This, in spite of the fact that it plainly appears that the motion n.o.v. was made in the district court in this case. The reasoning by which this case

is supposed to justify certiorari here is altogether too thin and tenuous for us to be able to follow it.

Similarly, Petitoner's reference to another of its many tort cases, *Breece v. Chapman & Sons*, 302 F. 2d 581, where the writ has since been granted by this Court, is just one more instance of Petitioner's aversion from the law of contracts, its unwillingness to discuss the real issue: Was there substantial evidence indicating a meeting of the minds of the parties on all of the terms of their proposed contract?

Under this heading, Petitioner also argues that it has been deprived of the protection of the Seventh Amendment. The thrust of its argument appears to be that whenever a Court of Appeals sets aside a jury verdict for insufficiency of the evidence, it is incumbent on this Court to review the decision below on the theory that a grave constitutional issue is involved.

Petitioner seems to think that the Seventh Amendment precludes a Court of Appeals from ever re-examining the evidence in a jury case. This supposition flies in the face of the plain language of the Amendment, which permits a court to re-examine such evidence "according to the rules of the common law." Appellate Courts have traditionally had the power to re-examine the evidence in order to determine its sufficiency and to determine whether the trial judge

committed error in submitting the case to the jury, and the Court of Appeals here did no more than that.

As the Court pointed out in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 659 (1935):

> "Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court."

And in *Gunning v. Cooley*, 281 U.S. 90, 94 (1930), the Court reaffirmed the traditional rule that:

> " 'In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' " (Citing cases)

In view of Petitioner's admirable diligence in uncovering purely factual issues in negligence, insurance and FELA cases, where this Court has reversed Courts of Appeal that had set aside jury verdicts, it may not be out of place to remark that in many more instances, this Court has denied certiorari in situations involving directed verdicts or judgments n.o.v. in both contractual and non-contractual cases. See, *e.g.*, the recent decisions in *Lee v. Jenkins Bros.*, 268 F. 2d 357 (2nd Cir.) 1959; *Black v. Sinclair O. & G. Co.*, 294 F. 2d 580 (5th Cir., 1961) cert. den'd. 369 U.S. 849; *No. Carolina Nat. Gas Corp. v. McJunkin Corp.*, 300 F. 2d

794 (4th Cir., 1961), cert. den'd. Oct. 8, 1962, 31 U.S. L.W. 3117; *Firemen's Ins. Co. v. Robbins Coal Co.*, 288 F. 2d 349 (5th Cir., 1961), cert. den'd. 368 U.S. 875; *Trivette v. N. Y. Life Ins. Co.*, 283 F. 2d 441 (6th Cir., 1960) cert. den'd 368 U.S. 838; *Manaia v. Potomac Elec. Power Co.*, 268 F. 2d 793 (4th Cir., 1959), cert. den'd 361 U.S. 913.

Petitioner's attempt to convert this case into one involving great constitutional issues can best be characterized by quoting the recent opinion in the *Manaia* case, supra, where the Court in affirming judgment n.o.v. for the defendant in a negligence case, wrote:

> "Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment . . . The power of the court to withdraw such cases from the jury is too firmly rootel in history and tradition for frontal attack . . . the attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this."

To the same effect, see Chief Judge Magruder's opinion in *Smith v. Reinauer Oil Tr., Inc.*, 256 F. 2d 646 (1st Cir., 1958).

6. Petitioner Claims Conflict Between Circuits.

(Petitioner's Point 6) Equally far afield is Petitioner's point that it is relevent for this Court to settle in this case the alleged dispute respecting the

"law of the case" between the U.S. Courts of Appeal for the Second and Eigth Circuits. In our case, the Ninth Court of Appeals in no respect disregarded "the law of the case" as made by instructions of the trial judge.

On the contrary, the Court of Appeals merely held, in accordance with the many decisions of the Supreme Court of Washington that we have heretofore cited, that is was error to leave to the jury as a matter of fact the question of the adequacy of the undisputed evidence to show that a completed contract had been agreed upon by the parties when under the law of this state and all other states that was a question of law to be determined by the trial judge.

Further, a critical study of *Pierce Cons. Co. v. Burlington*, 221 F. 2d 607 (2nd Cir.), and *Coca Cola B. Co. v. Hubbard*, 203 F. 2d 859 (8th Cir.) (not 186 F. 2d 148, as cited in the Petition), discloses that Petitioner is plainly in error in asserting a conflict between these Circuits.

And see particularly *Lyons v. Empresa Hondurena De Vapores S.A.*, 273 F. 2d 317, 319 (2nd Cir. 1959), where the Second Circuit expressed exactly the same views as the Eighth Circuit. This Court denied certiorari in 363 U.S. 963 (1960) on the precise question of whether an unchallenged jury instruction becomes the law of the case.

7. Petitioner Urges That Western Asphalt Co. v. Valle, 25 Wash. 2d 428, 171 P. 2d 159, Disregarded by Court of Appeals.

(Petitioner's Point 7) Under this heading, Petitioner takes the position that the two cases, *Western Asphalt Co. v. Valle* (1946), 25 Wash. 2d 428, 171 P. 2d 159, and the later case of *Milone, etc. v. Bona Fide Builders, Inc.*, (1956), 49 Wash. 2d 363, 301 P. 2d 759:

> "... made the Washington law doubtful which required the Court of Appeals, for that reason alone, to follow the permissive views of the above trial judge."

In what respect was the Washington law doubtful? Petitioner does not say. A study of these two cases leaves no room for this claim. In the *Milone* case, the earlier *Western Asphalt* case is clearly and definitely distinguished. Actually, Petitioner is foreclosed from relying on the *Western Asphalt* case, supra, because in that case, the plaintiff was not claiming an agreement to be awarded the sub-contract but was merely claiming reimbursement for its services in preparing and submitting his bid.

Petitioner, assuming that it might not be able to prove a contract, had alleged in its first cause of action an implied-in-fact contract to pay Petitioner for services rendered in preparing and submitting its written offer. But in this case, the trial judge dismissed this first cause of action of Petitioner at the close of Pe-

titioner's case, because there was no testimony to support it, from which ruling Petitioner did not appeal. This obliged Petitioner to base its right of recovery solely on its second cause of action, to-wit, on an express or implied-in-fact contract that Petitioner would be given a sub-contract for the items in question. Here, it ran headlong into the later *Milone* case, supra, and it has been trying ever since, to get back to the *Western Asphalt* case, but without avail. In fact, there is no conflict expressed between the trial judge and the Court of Appeals as to the law of Washington respecting the *Milone* case and the earlier *Western Asphalt* case.

In this instruction to the jury, the trial judge warns the jury that the fact

> "... that defendant put the name of the plaintiff in its bid as the supplier of the gates and hoists in bid item 8.1A is not evidence of a completed contract between the parties." (R. 687)

The statement of the Washington law corresponds with the Court of Appeals' statement that "In Washington, use of a bid by a prime contractor is not the legal equivalent of acceptance." Citing the *Milone* case.

Where the trial judge committed error was in further saying to the jury in this instruction that this use of the name of the supplier

> ". . . may be considered with all of the *other evidence in the case* in making your determination of whether there was a complete offer and acceptance and a meeting of the minds in order to constitute a bilateral contract." (Emphasis added) R. 687)

Here, the trial judge abdicates his function which was to determine in the first instance, as a question of law, whether there was any evidence of "a complete offer and acceptance."

8. Petitioner Urges Milone v. Bona Fide Builders Merely Makes Washington Law Doubtful.

(Petitioner's Point 8, pp. 17-18) Petitioner here asks this Court to hold that "after the general contractor uses and benefits by a subcontractor's bid" he cannot later cast him aside. This emphasis on the controlling importance of the subcontractor's bid or estimate as implying acceptance from the mere passage of time is much more than a request to this Court to reverse our Court of Appeals in this case. It also, in effect, asks the Court to reject the *Milone* case, which considers at length the doctrine of contracts implied-in-fact with reference to the bid of a subcontractor and decisively rejects it.

But on this point, the *Milone* case does not stand alone. In *Kellogg v. Gleeson*, 27 Wash. 2d 501, 505, 178 P. 2d 969, the rule respecting implied contracts was stated as follows:

> "The burden of proving an express or implied contract is on the party asserting it, and he must prove each fact essential thereto, including the existence of a mutual intention. Where circumstantial evidence is relied on, the circumstances must be such as to make it reasonably certain that the parties intended to and did enter into the alleged contracts."

The above language was quoted by the Washington Supreme Court and applied in denying existence of an implied contract in the case of *Ross v. Raymer*, 32 Wash. 2d 128, 139, 201 P. 2d 129.

9. Petitioner Argues Its Evidence Made Case for Jury.

(Petitioner's Point 8, pp. 18-21) Here, Petitioner's major contention is that a general contractor "cannot lead the sub-contractor to believe for almost five months that he has accepted the offer and that the *perfunctory* purchase order will be later issued." (p. 18) (Emphasis added)

This so-called "perfunctory" purchase order is the written acceptance of the proposal of the bidder, the binding contract which determines that the minds of the parties have finally met in agreement on all of the terms of the contract. It has special importance where the amount involved is over two million dollars and the contract involved many complex details.

The calendar of the several proposals made by Petitioner during this five months period, recited in our

Statement of the Case, discloses the preliminary character of the negotiations up to the time when Respondent placed its order elsewhere. After negotiations had been thus broken off, Petitoner referred to the course of conduct of the parties as "negotiations," not a contract. (Tr. 406) In its later letter, it affirmed that its last offer to Respondent "left the door open . . . *for further discussion*, therefore our figures were *not* necessarily final figures." (Tr. 417, 418) (Emphasis added)

Assuredly, this disclaimer of Petitioner made after the negotiations had been broken off, is evidence of the most persuasive character that no complete and binding contract had been entered into by the parties. What other conclusion, then, could the Court of Appeals reach than that the parties were still bargaining until the time when Respondent, dissatisfied with Petitioner's repeated price increases, placed its order elsewhere, only 11 days after Petitioner's last price raise?

10. Petitioner Urges an Implied-in-Fact Contract.

(Petitioner's Point 8, pp. 22-24) Petitioner's last contention is that the evidence made a question for the jury on an "implied-in-fact", if not express, contract," that the jury "could have found acceptance from inferences" (p. 24). This is well answered by the follow-

ing language used by the Supreme Court of Washington in the *Milone* case as follows:

> "Before a court can find the existence of an implied contract in fact, there must be an offer; there must be an acceptance, the acceptance must be in the terms of the offer; it must be communicated to the offerer; there must be a mutual intention to contract; (*Chandler v. Washington Toll Bridge Authority*, 17 Wash. 2d 591, 137 P. 2d 97); there must be a meeting of the minds of the parties. (*Richards v. Kuppinger*, 46 Wash. 2d 62, 66, 278 P. 2d 395.)"

To the same effect, see also *Troyer v. Fox*, 162 Wash. 537, 554, 298 P. 733.

Furthermore, in looking at the disconnected nature of the testimony of Petitioner, we bear in mind that the Supreme Court of Washington has well established the rule that the facts relied upon to make a case of circumstantial evidence must be of such a nature and the facts must be so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them:

Arnold v. Sanstol, 43 Wash. 2d 94, 260 P. 2d 327;

Berkovitch v. Luketa, 49 Wash. 2d 433, 302 P. 2d 211;

Falconer v. Safeway Stores, Inc., 49 Wash. 2d 478, 303 P. 2d 294;

Ruff v. Fruit Delivery Co., 22 Wash. 2d 708, 157 P. 2d 730;

Gardner v. Seymour, 27 Wash. 2d 802, 180 P. 2d 564;

Neel v. Henne, 30 Wash. 2d 24, 190 P. 2d 775.

Nowhere does Petitioner come to grips with the essential issue in this case — the necessity to show a precise offer by it that Respondent could or did accept. At no point does counsel seek to show a meeting of the minds, a time when Petitioner made a complete and unconditional offer that Respondent accepted.

Indeed, Petitoner's theory of implied contract is simply an effort to offer a substitute for this failure of agreement.

11. Was Respondent's "Unsolicited Communication" of Use of Bid an Acceptance?

(Pet. Br., pp. 22-23) Petitioner's most far-fetched argument is that a mere "unsolicited communication" of the fact that Respondent had used its bid was, of itself, an acceptance of that bid, therefore a contract arose at that time. This is an impossible position. This "unsolicited communication" was sent at the beginning, not at the end, of this five months period of negotiations which Petitioner inconsistently argues is what led it to believe that its bid was finally accepted.

At the time of this "unsolicited communication," Petitioner had given its estimate covering only little over one half of what it was supposed to cover, as is demonstrated by the later negotiations set up in the calendar of events in our Statement of the Case.

Apart from these facts, the Washington Supreme Court in the *Milone* case considered at length this very same contention, quoting from a leading Utah case as follows:

> "In *R. J. Daum Const. Co. v. Child, Utah*, 1952, 247 P. 2d 817, 820, the prime contractor, having used the bid of the subcontractor in making its bid upon the prime contract, maintained an action for the subcontractor's refusal to perform the work. Whether there was a binding contract depended upon whether there was a meeting of minds. In referring to the *use* of the subcontractor's bid, the court said:
>
> > 'Neither the fact that appellant used respondents' bid in figuring its bid to the Government, that appellant's bid to the Government was the low bid and it was finally awarded the Government contract, the *communication* of such facts *to respondents*, . . . nor all these circumstances together definitely manifested an intention to accept respondents' bid and be presently bound thereby. Each and all of these circumstances are as consistent with an intention and expectation only to negotiate a contract in the future as they are *with a present intention* to accept and enter into a binding contract.' " (Emphasis added)

This was followed in the *Milone* opinion by an equally pertinent quotation exactly to the same effect from *Williams v. Favrit*, 161 F. 2d 822 (5th Cir.), 1947.

CONCLUSION

In the final paragraph of its petition for the writ, Petitioner cites six more of its purely factual cases, beginning with *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, and closing with *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370.

Just as Petitioner argues this contract case from claimed analogies drawn from tort and other non-contract cases, so its absence of Washington cases where there are so many on the subject of proof of offer and acceptance in the law of contracts is significant not only of their dilemma, but of the rightfulness of the decision of the Court of Appeals.

We urge that the Petition for the Writ of Certiorari in this case be denied.

Respectfully submitted,

BENJAMIN H. KIZER,
Spokane 1, Washington
1224 Old National Bank Building

GERALD DEGARMO
1308-1320, Northern Life Tower
Seattle 1, Washington

Attorneys for Respondent

KIZER, GAISER, STOEVE, LAYMAN & POWELL
ALLEN, DEGARMO & LEEDY
MANNING, HOLLINGER & SHEA
GLICKSTEIN, CRENSHAW, GLICKSTEIN & HULSEY

Of Counsel

Office Supreme Court, U.S.
FILED
JAN 2 1963
JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1962

No. 488

GUNDERSON BROS. ENGINEERING CORPORATION, an Oregon Corporation,
Petitioner,

v.

MERRITT-CHAPMAN AND SCOTT CORPORATION, a Delaware corporation,
Respondent.

PETITION FOR REHEARING

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1200 Jackson Tower,
Portland, Oregon,
CAMERON SHERWOOD,
SHERWOOD, TUGMAN & GREEN,
Baker Building,
Walla Walla, Washington,
Attorneys for Petitioner.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-62

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Respondent.

PETITION FOR REHEARING

Petitioner, Gunderson Bros. Engineering Corporation, prays for a rehearing of its petition for writ of certiorari, which was denied December 10, 1962 with the Chief Justice and Mr. Justice Black believing that certiorari should be granted, to consider whether Petitioner has been denied its right to jury trial guaranteed by the Seventh Amendment to the Constitution of the United States.

The Court of Appeals decision just published in *Merritt-Chapman and Scott Corp.* v. *Fredin* (9 Cir.,

Aug. 28, 1962) 307 F.2d 370, when compared as it must be with its earlier decision in which we are seeking a writ—*Merritt Chapman & Scott Corp.* v. *Gunderson Bros. Engineering Corporation* (9 Cir., June 19, 1962) 305 F.2d 659 — unequivocally demonstrates that the Court of Appeals not only reviewed the case at bar, but intends in the future to review like *contract* actions, upon a different standard than the ordinary negligence action. Such a policy of judicial review is repugnant to the nondiscriminatory language of the Seventh Amendment. That this Court by its silence may nurture the abhorrent policy of review apparently launched by the Court of Appeals, furnishes an additional cogent reason to grant certiorari and reverse the *Gunderson* case.

These two cases, one in tort and the other in contract, are properly compared from the viewpoint of U. S. District Judge Charles L. Powell of the Eastern District of Washington, who tried both of the cases. This, for the reason he must in the future look to the Court of Appeals and this Court for guidance in respect to ruling upon the critical post-trial motion for judgment n.o.v. and in the alternative for a new trial.

Each case was a diversity action against the same defendant, involving the same Priest Rapids Project and resulting in plaintiff's verdicts for about the same substantial sums ($98,387.10 and $91,360.00). Both were reviewed this summer by the same Court of Appeals with Circuit Judge Merrill common to the panel in each case. In each case, the critical issue was sufficiency of evidence to support a general verdict of the jury. In

each case, the trial judge had denied a motion for judgment n.o.v. and in the alternative for a new trial. However, in the *Gunderson* contract action, the trial judge was reversed, while in the *Fredin* negligence action he was affirmed.

In the *Fredin* case, a rock the size of a desk broke from the top of a 25-foot dirt embankment to roll down and strike the plaintiff. Prior to the accident, the defendant had tried to pry the rock loose, without success. Upon this factual base, the Court of Appeals found the evidence sufficient to support the general verdict for plaintiff. In justifying affirmance, the Court of Appeals adopted Washington law as its standard for review by quoting from *Gibson* v. *Spokane United Ry. Co.*, 197 Wash. 58, 84 P.2d 349, 350 (1938):

> "Where the minds of reasonable men may differ, the question (of negligence) should be submitted to the jury. If when so considered, we find there is substantial evidence to sustain the verdict, the judgment must be affirmed."

In the *Gunderson* case, this Petitioner had submitted a written offer to Respondent to furnish spillway and draft tube gates for the Priest Rapids Project which the Respondent as a general contractor was bidding to construct. In this action for breach of contract, the factual issue submitted to the jury was simply whether the Respondent through words and conduct of its officers and agents had led Petitioner to believe for almost five months that it had accepted Petitioner's offer, subject only to later issuing a perfunctory purchase order to memorialize the understanding after the Respondent

had signed the prime construction contract for which it had earlier been declared low bidder. The following was the salient evidence upon which the jury found that Respondent had accepted Petitioner's offer:

1. Respondent in the first instance had requested the special offer from Petitioner, which Respondent beneficially used and retained for almost five months (R. 4, 363, 364).

2. After being declared low bidder, Respondent telephoned Petitioner to advise that it had named Petitioner as the manufacturer of the spillway gates in its bid for the prime contract. Under the circumstances of that conversation, Petitioner understood: "it had the job" (R. 5, 169).

3. Respondent later told Petitioner that it would award a purchase order to Petitioner immediately after the prime contract was signed (R. 142) and, on another occasion: "It looks like you people have the job" (R. 166).

4. Respondent later told Petitioner it could proceed with shop drawings (first step in performance) (R. 188) and also, that Petitioner would be furnishing the draft tube gates (R. 183).

5. The same day that Respondent was declared low bidder it advised the manager of a barge line that Petitioner's figures had been used in bidding the spillway gates (R. 157) and that Petitioner would supply the spillway gates (R. 163). Four months later, Respondent wrote to a business firm in Seattle, Washington:

> "The following list of suppliers is furnished to you . . . Spillway Tainter Gates by Gunderson Bros. of Portland, Oregon. . . . Spillway bridges has not been determined yet" (R. 387, P. Ex. 8).

Had the Court of Appeals in reviewing *Gunderson* applied the standard of "where the minds of reasonable men may differ" as it did in reviewing *Fredin*, it would have been required to affirm *Gunderson* as it did Fredin. Instead, however, the Court of Appeals brought about the incongruous reversal in *Gunderson* by ignoring this traditional standard of review through the device of omitting discussion of certain evidence and interpreting other evidence into insignificance in order to reach a result contrary to the jury. This Court has since reversed the Court of Appeals for doing the very same thing in an anti-trust case. *Continental Ore Co.* v. *Union Carbide* (June 25, 1962) 370 U. S. 690.

However, the most important consideration at this time is the impact which *Gunderson* and *Fredin* make upon the bench and bar in the Ninth Circuit. With good reason, these two decisions now require trial judges in measuring delicate motions for judgment n.o.v. to apply the rule of limited review to negligence actions but not to contract actions, at least where the jury issues approach those which existed in the *Gunderson* case. Clearly, District Judge Charles L. Powell was reversed in *Gunderson* for applying the rule in *Fredin* (R. 29). It was to protect against the very thing which has here occurred that our wary ancestors included the Seventh Amendment in the Bill of Rights. The mandatory language of this Amendment leaves no room for

a Court of Appeals to employ a variable or ambulatory standard of review. Likewise, the Court of Appeals should not be permitted to apply a uniform standard of review to justify cases it desires to affirm, only to ignore such standard when bent upon reversal.

HERE IS THE LATEST
FROM THE NINTH CIRCUIT COURT OF APPEALS

In petitioner's case, the Court of Appeals completely ignored *Western Asphalt Co.* v. *Valle*, 25 Wn.2d 428, 171 P.2d 159 (1946), which petitioner contended was the controlling Washington law, and which held that the question of whether or not an implied-in-fact contract exists is for the jury.

On October 11, 1962, even after the *Fredin* case, a different panel of the same Court of Appeals in *Osborn* v. *Boeing Airplane Co.*, 309 F.2d 99, in a case involving contractual questions, did not ignore the *Western Asphalt* decision, but instead twice cited it with approval. In so doing, the court reversed the District Court for the Western District of Washington and held that the question of whether or not an implied-in-fact contract exists is for the jury.

Now is the time for this honorable Court to grant certiorari and finally resolve this confusion!

A SEVENTH AMENDMENT VIOLATION SHOULD BE PRESUMED

A further and additional reason to grant a writ rests in the proposition that the trial judge denied a motion for a new trial. One ground of respondent's motion for a new trial was the insufficiency of the evidence (R. 27). In denying the motion for new trial, the trial judge in a written opinion concluded:

> "I have considered all of the defendant's arguments in support of its Motion for New Trial. I do not believe that substantial justice requires any action on my part to set aside the verdict. The jury was, in my opinion, correctly instructed, and they returned their verdict on disputed evidence on questions of fact" (R. 33).

Upon a motion for new trial, the trial judge was not as hobbled as he was in respect to denying a motion for judgment n.o.v. (which he also did) because he possessed a broad discretionary power to not only grant a new trial if the quantum of evidence was lacking but also if the weight of the evidence (pro and con) taken as a whole did not in his opinion support the verdict. *Montgomery Ward & Co.* v. *Duncan* (1940) 311 U.S. 243, 251; *Murphy* v. *U. S. District Court* (9 Cir., 1944) 145 F.2d 1018, 1020; *McCracken* v. *Richmond F & P R Co* (4 Cir., 1957) 240 F.2d 484. This is more power than the Court of Appeals had in order to reverse upon insufficiency of the evidence.

With the trial judge having so carefully considered Respondent's motion for a new trial and having had the feel of the case that no printed appellate record

could ever impart, *Cone* v. *West Virginia Pulp & Paper Co.* (1947) 330 U.S. 212, this Court should assume that the trial judge considered that not only was the evidence substantial but that its weight as well was in full support of the verdict and that if this was not so he would have granted the motion for a new trial. This being the case, on a petition for certiorari or rehearing thereof, this Court should presume that in all probability the Court of Appeals in reversing the trial judge solely for insufficiency of evidence did so by re-examining the facts, as forbidden by the Seventh Amendment. Unless this Court gives weight to the trial judge's views, which the Court of Appeals neglected to do, the federal trial system will be greatly impaired at the trial level.

CONCLUSION

Duty versus time. We are sure this Court recognizes its duty to give living effect to the Seventh Amendment as much as to any other in the Bill of Rights. We, in turn, are appreciative of the fact that the only way a violation of the Seventh Amendment can be detected is to examine the record in each case; a chore that is most taxing upon the time of a very busy Court. We humbly suggest that this Court in striking a balance between duty and time, vote in favor of duty where, as in the case at bar, the Court of Appeals reversed because the trial judge *denied* a motion for judgment n.o.v. and in the alternative a new trial. This is something which the Ninth Circuit Court of Appeals has never done prior to now and something which is truly a rarity in other circuits. By such a policy, the proba-

bility is great that it would be selecting to review more cases having true violations than otherwise; would not permit the lower Courts to believe that the Seventh Amendment is dead; and would be giving needed support to the many District Judges who, day to day, decide causes at the trial level.

Wherefore, Petitioner prays for rehearing and the ultimate granting of certiorari and reversal of the case at bar.

Respectfully submitted,

WILLIAM F. WHITE,
WHITE, SUTHERLAND & WHITE,
1200 Jackson Tower,
Portland, Oregon,

CAMERON SHERWOOD,
SHERWOOD, TUGMAN & GREEN,
Baker Building,
Walla Walla, Washington.

CERTIFICATE OF COUNSEL

I, William F. White, being a member of the Bar of this Court and the attorney who prepared this petition for rehearing, do hereby certify that the petition is presented in good faith and not for purposes of delay and, in my opinion, it is restricted to the grounds for such a petition as set forth in Rule 58 of this Court.

WILLIAM F. WHITE